No. 02-954

IN THE

Supreme Court of the United States

OFFICE OF INDEPENDENT COUNSEL,

Petitioner,

v.

ALLAN J. FAVISH,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC. AND EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. FOIA EXEMPTION 7(C) IS INAPPLICABLE BECAUSE PHOTOGRAPHS TAKEN OF A PUBLIC SCENE IN A PUBLIC PARK ARE NOT "PERSONAL", NOR IS DISCLOSURE "UNWARRANTED" 5

A. The Photographs Fail to Meet the "Personal Privacy" Requirement of Exemption 7(C) 6

B. The Photographs Fail to Meet the "Unwarranted" Requirement of Exemption 7(C) 8

II. EXEMPTION 7(C) IS INAPPLICABLE TO CONCEAL INFORMATION RELATED TO GOVERNMENT REPORTS CONCERNING THE UNEXPECTED DEATH OF A HIGH-RANKING GOVERNMENT OFFICIAL 11

III. REDACTION OF PERSONAL CHARACTERISTICS, NOT WHOLESALE CONCEALMENT, IS ALL THAT EXEMPTION 7(C) COULD PERMIT HERE IN THE NAME OF PRIVACY 16

CONCLUSION 18

TABLE OF AUTHORITIES

Pages

Cases

Accuracy in Media v. National Park Service, 194 F.3d 120 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1111 (2000) 10, 15

Association of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898 (D.C. Cir. 1993) 2

Bowen v. FDA, 925 F.2d 1225 (9th Cir. 1991) 14

Cal. Bankers Ass'n v. Shultz, 416 U.S. 21 (1974) 7

Cooper Cameron Corp. v. United States DOL, 280 F.3d 539 (5th Cir. 2002) 17

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 14

Department of Air Force v. Rose, 425 U.S. 352 (1976) 8

Environmental Protection Agency v. Mink, 410 U.S. 73 (1973) 5, 9

Favish v. OIC, 217 F.3d 1168 (9th Cir. 2000) 4, 11

Garrison v. Louisiana, 379 U.S. 64 (1964) 11

Katz v. National Archives & Records Administration, 862 F. Supp. 476 (D.D.C. 1994), *aff'd on other grounds*, 68 F.3d 1438 (D.C. Cir. 1995) 13

New York Times Co. v. NASA, 782 F. Supp. 628 (D.D.C. 1991) 15

SafeCard Servs., Inc. v. SEC, 926 F.2d 1197 (D.C. Cir. 1991) 10

Swidler & Berlin v. United States, 524 U.S. 399 (1998) 5, 11

United States DOJ v. Reporters Comm. for Freedom of Press, 489 U.S. 749 (1989) ..... *passim*

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) 16

Upjohn Co. v. United States, 449 U.S. 383 (1981) 12

Statutes, Regulations and Legislative Materials

5 U.S.C. § 552(b) 16

5 U.S.C. § 552(b)(6) 13

5 U.S.C. § 552(b)(7)(C) 3, 6, 8

58 Fed. Reg. 21,330 (1993) 2

58 Fed. Reg. 28,655 (1993) 2

58 Fed. Reg. 29,854 (1993) 2

H.R. Rep. No. 104-849 12

Other

Arlington National Cemetery Website, James Vincent Forrestal, http://www.arlingtoncemetery.net/jvforres.htm (viewed 8/15/03) 12

Breckenridge, *The Right to Privacy* (1970) 8

Goodenough, "Go Fish: Evaluating the Restatement's Formulation of the Law of Publicity," 47 S.C. L. Rev. 709 (1996) 7

Project, "Government Information and the Rights of Citizens," 73 Mich. L. Rev. 971 (1974-1975) 8

Westin, *Privacy and Freedom* (1967) 8

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INTEREST OF *AMICI CURIAE*[1]

The Association of American Physicians & Surgeons, Inc. ("AAPS") is a non-profit organization dedicated to defending the practice of private medicine. Founded in 1943, AAPS publishes a newsletter, journal and other materials in furtherance of its goals of a limited and accountable government. AAPS files requests under the Freedom of Information Act (FOIA) and state equivalents. It sued to enforce the Federal Advisory Committee Act (FACA) against the Clinton Administration's Task Force on National Health Care Reform,

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

which Vincent Foster was handling when he tragically died. *Association of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993); 58 Fed. Reg. 29,854 (1993) (Mr. Foster's court-required FACA order); 58 Fed. Reg. 28,655 (1993) (same); 58 Fed. Reg. 21,330 (1993) (same). AAPS has a strong interest in construing FOIA exemptions narrowly, and in obtaining full disclosure of the facts surrounding the death of Mr. Foster in particular. Physician members of AAPS include pathologists having medical expertise to analyze the photographs at issue for the benefit of all.

Eagle Forum Education and Legal Defense Fund ("EFELDF") is a nonprofit organization founded in 1981. For more than twenty years it has sought a limited and accountable government. EFELDF relies on full enforcement of FOIA in order to hold the government accountable for its actions. EFELDF has a strong interest in ensuring that information concerning the death of any high government official, including Vincent Foster, is made available to the public.

Amici have a direct and vital interest in the issues presented to this Court based on their reliance on FOIA for governmental accountability.

SUMMARY OF ARGUMENT

On July 20, 1993, Vincent Foster became the highest ranking federal government official to die in office in the thirty years after President John F. Kennedy's assassination. There is a compelling interest in obtaining full disclosure with respect to such death. Inevitably, the details about death by gunshot are tragic and unsettling. But the necessity for government accountability is not lessened by the horrifying nature of the incident. A high ranking government official was mortally wounded, and government has no authority for withholding direct evidence indicating how. All the disputed photographs should be released.

The government account pinned the entire blame for the death on the victim, Vincent Foster. Federal investigations repeatedly proclaimed the government to be innocent of any malfeasance but Vincent Foster to be guilty of suicide, an act deemed morally unacceptable by major religions. But these governmental conclusions were self-serving, exonerating the very institution that funded them and transferring all the fault to someone unable to defend himself. Undoubtedly a dozen more investigations by the federal government would reach the same result, deserved or not. Even if it was a suicide, numerous unanswered questions remain about whether the body was moved and reporting delayed in order to provide additional time to remove documents from Mr. Foster's office.

The Freedom of Information Act (FOIA) exists so that citizens may reach their own conclusions based on their own review of evidence, free from institutional bias. There is no reason to depend on hearsay about official information; it can and should be viewed directly by the objective public. Ten years later, many questions remain about whether Mr. Foster committed suicide or was the victim of murder. Post-mortem official photographs are direct evidence of the truth, and can immediately reveal the bullet wounds, direction of blood flow, and probability of assault. FOIA prevents government from forcing us to depend on its description of evidence. FOIA requires government to produce the hard evidence itself.

The privacy exemption to FOIA, Exemption 7(C), does not justify withholding these photographs. 5 U.S.C. § 552(b)(7)(C). There is no meaningful privacy interest in someone who has departed this life, just as his estate would lack any cause of action for defamation. Here, Mr. Foster's reputation could well be aided by refutation of the claim that he committed suicide. If a victim of wrongdoing by others, his plight would cry out for overdue justice. This Court

should establish that Exemption 7(C) does not extend beyond a subject's life.

Even if Exemption 7(C) does apply, redaction of only the offending portions of the photographs would fully satisfy it. Highly personal aspects of the pictures, such as Mr. Foster's eyes, could be omitted while producing portions disclosing the wounds. With computer technology, perhaps the parties could even alter the apparent identity of the victim without changing the information crucial to the investigation. At a minimum, redaction should be ordered rather than wholesale withholding of the records.

ARGUMENT

The Ninth Circuit was correct in ordering review of the photographs by the district court, though it did not go far enough in ordering their release. The reasoning of the Ninth Circuit was sound with respect to the purpose of FOIA:

> To anyone familiar with famous cases in the Old World or in the New it is a feature of famous cases that they generate controversy, suspicion, and the desire to second guess the authorities. The continuing discussion of the assassination of President Kennedy may suffice to make the point. **[FOIA] establishes a right to look, a right to speculate and argue again, a right of public scrutiny that can be denied only if the relevant statutory exemption applies.**

Favish v. OIC, 217 F.3d 1168, 1173 (9th Cir. 2000) (emphasis added).

FOIA mandates this "right to look" so that citizens are not beholden to and wholly dependent on governmental accounts and interpretation of evidence withheld. "Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *Environmental Protection Agency v. Mink*, 410 U.S. 73, 80 (1973). The very purpose of FOIA is to guarantee access to official information possessed by a government that has not willingly released it. The post-mortem photographs of Vincent Foster fall squarely within this mandate for disclosure.

The Ninth Circuit erred, however, in limiting FOIA by finding a broad right of privacy for relatives of the deceased under Exemption 7(C). Defamation does not survive death; nor does common law invasion of privacy. The FOIA privacy exemption is not animated by public policy like the attorney-client privilege, held to extend after death in order to promote frank communications. *See Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). Nothing about this FOIA exemption is designed to encourage action by the subject, and it cannot justify withholding official information gathered in public view about a subject who was already deceased.

The government presented a self-serving explanation of the death – that Mr. Foster supposedly committed suicide – and cannot now hide behind the privacy exemption to protect its account. Nor can relatives assert a derivative claim to privacy to prevent disclosure under Exemption 7(C).

I. FOIA EXEMPTION 7(C) IS INAPPLICABLE BECAUSE PHOTOGRAPHS TAKEN OF A PUBLIC SCENE IN A PUBLIC PARK ARE NOT "PERSONAL", NOR IS DISCLOSURE "UNWARRANTED".

According to the government, Vincent Foster killed himself in a public park, where public discovery was inevitable. If true, then he could not possibly have any reasonable expectation of privacy and there can be no privacy basis for withholding the photographs. If the government's version is untrue, then the need for release of the photographs is compel-

ling even if privacy is invaded. Either way, Exemption 7(C) does not justify withholding the photos.

Exemption 7(C) allows withholding records only if they "could reasonably be expected to constitute an **unwarranted** invasion of **personal privacy** ...." 5 U.S.C. § 552(b)(7)(C) (emphasis added). Accordingly, an invasion of privacy is not sufficient to trigger this exemption. The invasion must be of "personal" privacy, and it must be "unwarranted". Neither requirement is satisfied here.

A. The Photographs Fail to Meet the "Personal Privacy" Requirement of Exemption 7(C).

The photographs fail to meet the "personal privacy" requirement because they merely capture what was available to any member of the public who wandered into Fort Marcy Park at the appropriate time. The pictures were not taken in a home, a private hotel room or even a medical facility. They are non-medical photographs of a scene on public property in open view. The subject was fully clothed and remarkably neat. Government announced to the whole world intimate facts relating to Mr. Foster's death, leaving no cognizable privacy interest to protect in connection with the photographs themselves.

The photographs are devoid of any identifying details about Mr. Foster that would intrude on his privacy, or that of his next-of-kin, within the meaning of Exemption 7(C). In *United States DOJ v. Reporters Comm. for Freedom of Press*, this Court construed the privacy interest to be one of "identifying details" and "identifying information." 489 U.S. 749, 769 (1989). There, criminal "rap sheets" on individuals qualified for Exemption 7(C) from FOIA because they contain facts in the distant past about private citizens, not otherwise readily available to the public. The harm attendant to disclosure of one's prior criminal record is completely absent from the disclosure of blood flow on a dead body or a disputed bullet-hole in his neck. Moreover, the exemption in

Reporters Comm. did not extend to the deceased, nor to public officials; the Department of Justice released the requested rap sheets on individuals who had died.

The photographs at issue here do not contain "identifying information" about Mr. Foster, or anyone else, of a private nature. Already the government has officially declared that he had committed suicide, and nothing in the photographs could add to the harm of that personal stigma. Unlike *Reporters Comm.*, there is no identifying information, such as a criminal background, that could potentially harm the subject or even his next-of-kin. The government has already identified and disclosed all the facts that plausibly support its investigation. The standard set by *Reporters Comm.* to satisfy Exemption 7(C) is not met here.

Nor can the privacy exemption under FOIA become a derivative right claimed on behalf of individuals other than the subject himself. Privacy, if it means anything at all, must be only a personal right that terminates upon death. A "tort-like attribute limited the right of privacy to the period of the individual's life. If the justification for the right is to prevent embarrassment and personal distress, then death presumably removes the problem. Similar considerations have limited the right to sue for defamation under traditional common-law principles .... [T]he New York privacy statute restricted protection to 'any living person,' and the jurisdictions which found privacy in the common law generally followed suit." Goodenough, "Go Fish: Evaluating the Restatement's Formulation of the Law of Publicity," 47 S.C. L. Rev. 709, 731 (1996). Nor does the individual privacy right exist for corporations. *See, e.g., Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 66 (1974) (denying an individual right to privacy to corporations because they "are endowed with public attributes" – a compelling reason to deny the right to public officials).

Every plausible articulation of a privacy right is in wholly personal terms. "Privacy ... is ... the individual's right to control dissemination of information about himself."

Breckenridge, *The Right to Privacy* 1 (1970) (quoted by *Reporters Comm.*, 489 U.S. at 764 n.16). *See also id.* (quoting Westin, *Privacy and Freedom* 7 (1967) ("Privacy is the claim of individuals ... to determine for themselves when, how, and to what extent information about them is communicated to others") and Project, "Government Information and the Rights of Citizens," 73 Mich. L. Rev. 971, 1225 (1974-1975) (noting that "the right of privacy is the right to control the flow of information concerning the details of one's individuality").

The photographs do not contain any information about Mr. Foster's widow or sister, or even his children, that might trigger Exemption 7(C). They may suffer offense and discomfort, and Congress has the power to pass legislation protecting them against that emotional distress. But Congress has not done so, or indicated any desire to do so. Emotional distress in third parties resultant from release of information gathered on public property about an individual may be too speculative to guard against. Moreover, Mr. Foster's children have not sued in this action to block release of the photographs. They have an interest in learning the truth here and could ultimately benefit from the requested disclosure.

B. The Photographs Fail to Meet the "Unwarranted" Requirement of Exemption 7(C).

The photographs also fail to meet the "unwarranted" requirement of Exemption 7(C), which allows withholding records only if disclosure could be "an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Warranted invasions of the personal privacy are fully subject to FOIA, and the records must be disclosed.

This Court has found disclosures to be warranted if they further "the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" *Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976). Where, as here, the information consists of official documents

about public images of a high-ranking government official, then disclosure is mandated to satisfy FOIA. "FOIA's central purpose is to ensure that the **Government's** activities be opened to the sharp eye of public scrutiny, not that information about **private citizens** that happens to be in the warehouse of the Government be so disclosed." *Reporters Comm.*, 489 U.S. at 774 (emphasis added). Nothing about Mr. Foster or the circumstances of his death suggest that disclosure would be unwarranted with respect to the purposes of FOIA.

The government itself insists that it investigated the death seven different times – each time by a federal authority – an admission both of the importance of the controversy and the lack of a non-federal, independent inquiry. Brief for the Petitioner 2-5, 11 ("Pet. Br."). FOIA establishes that we need not depend only on the one-sided perspective of government in these investigations. "'The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to.'" *EPA v. Mink*, 410 U.S. at 105 (Douglas, J., dissenting) (quoting the historian Henry Steele Commager). These much-criticized reports on Mr. Foster's death consist of the very governmental activity deserving of the "sharp eye of public scrutiny." *Reporters Comm.*, 489 U.S. at 774.

The purpose of the particular request is not controlling, nor is speculation about media attention after disclosure of highly sought records. *Reporters Comm.*, 489 U.S. at 772. The goal of FOIA is to advance "public scrutiny," and more of that publicity cannot disqualify records from disclosure. FOIA does not include an exemption stating that if its purpose is attained by extraordinary publicity, then the records may be withheld by government to avoid that publicity. Publicity is what FOIA supports, without limit on amount.

Nor is a request for information presumptively unwarranted in the absence of proof of wrongdoing by the govern-

ment, as the D.C. Circuit held on similar facts. *Accuracy in Media v. National Park Service*, 194 F.3d 120 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1111 (2000). "To show that the invasion of privacy was not 'unwarranted,' AIM must show 'compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the [photos] is necessary in order to confirm or refute that evidence.'" 194 F.3d at 124 (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1205-06 (D.C. Cir. 1991)). Nothing in Exemption 7(C) requires such a heightened showing by a FOIA requester. Rarely, if ever, would a requester even have access to such proof, and the *SafeCard Servs.* precedent should not extend beyond withholding names and addresses. 926 F.2d at 1206 ("[U]nless access to **the names and addresses of private individuals** appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure.") (emphasis added). There is no proof-of-illegality requirement to FOIA requests in general, as the statute requires government accountability regardless of evidence of wrongdoing.

The position of Respondents is, at bottom, self-contradictory. Media attention on the photographs would be directly a function of their inconsistency with the official government position. If the photographs are in conflict with the published reports, then there should be media comment. Such scrutiny would be exactly what FOIA requires when the evidence does not support government claims. Some family members may welcome the possibility that Mr. Foster did not commit suicide as originally announced.

If government may withhold post-mortem pictures of a government official on the ground of privacy, then it will be impossible to scrutinize any future pronouncement about a violent death of a high public official. Such a precedent would be destructive of FOIA. Three separate courts – the District Court for the D.C. Circuit, the Court of Appeals for

the D.C. Circuit, and the District Court for the Central District of California – all held in favor of the government's assertion of the privacy exemption *without first looking* at the photographs themselves. *Favish v. OIC*, 217 F.3d at 1174 ("But no court has ever seen" the photographs. "Balancing without a knowledge of what the photos show would be an exercise in the air."). No accountability for government can survive the expansive view of Exemption 7(C) adopted by these other courts, which upheld concealment without ever viewing the evidence. Full disclosure of the photographs is warranted under FOIA.

II. Exemption 7(C) is Inapplicable to Conceal Information Related to Government Reports Concerning the Unexpected Death of a High-Ranking Government Official.

The photographs contain evidence directly relevant to continuing criticisms of governmental claims about the unexpected death of a high-ranking government official. "[W]here the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth." *Garrison v. Louisiana*, 379 U.S. 64, 72-73 (1964). The official reports about the death of Vincent Foster were completely self-serving, ascribing no possible fault to government and heaping blame and humiliation on the victim. FOIA ensures that citizens need not take the government's account at face value, but may view non-medical evidence directly themselves.

Petitioner's position here is at odds with its stance before this Court over five years ago, when the Office of Independent Counsel (OIC) demanded access to personal attorney-client communications of Mr. Foster. *Swidler & Berlin v. United States*, 524 U.S. 399 (1998). The OIC insisted that the attorney-client privilege does not survive death, and the D.C. Circuit held in favor of the OIC there also. But this Court

held that this privilege does survive death because it "is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" *Id.* at 403 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). In contrast, no such policy interest is at stake with respect to these photographs, and there is no justification for finding a right to privacy under FOIA that survives death. OIC is simply safeguarding its own reputation, not Mr. Foster's, in withholding these particular photographs. Pet Br. at 42-43 (detailing all the intimate information that the OIC did disclose about Mr. Foster in support of its reports, while refusing to release records potentially inconsistent with its claims).

The Fiske and Starr Reports by the OIC insist that Mr. Foster, who was the well-liked, number-one graduate of Arkansas Law School and the top scorer on his bar exam, suddenly committed suicide without any preparation in his work or family life. It is a conclusion that strains credibility, as suicide is very rare at that level of responsibility and observation. None of the erratic behavior associated with suicide was observed in Mr. Foster prior to his death, and his strong sense of responsibility belies such a complete abandonment. In contrast, Defense Secretary James Forrestal had formally resigned from his post and was admitted to a Navy hospital before he died plunging from its sixteenth floor.[2]

The clandestine removal of objects from Mr. Foster's office at the time of his death raises a healthy skepticism by those outside of the federal government about subsequent denials of wrongdoing. *See, e.g.*, H.R. Rep. No. 104-849, at 121-86 (asserting that White House officials were responsible for a cover-up and even obstruction of justice after Foster's death). The claims about a mutilated suicide note, missing from initial searches of Mr. Foster's briefcase and then inexplicably withheld for years from meaningful public scrutiny until examiners eventually considered it to be a forgery, do nothing to bolster the official theory. FOIA does not guarantee final answers, but does ensure that the government may not conceal evidence to safeguard its own reports.

[2] http://www.arlingtoncemetery.net/jvforres.htm (viewed 8/15/03).

Everything about the finding of Mr. Foster's body is consistent with its having been *placed* in its final location rather than his dying there. Investigators found little blood and no bullet; the gun, surprisingly, was still in his hand; the gun lacked his fingerprints; his posture was improbably straight; his shoes lacked dirt that would have been inevitable had he walked through the park; and rug fibers were all over his clothes, as though he had been rolled in a carpet and moved. The point here is not to ask the government to reopen its own investigation, but to obtain the accountability guaranteed by FOIA. This law ensures that citizens need not rely on government claims about the evidence, but may look and decide for themselves.

The photographs are not autopsy material that may warrant privacy protection, as urged by relatives of other victims. For example, the court below cited a precedent for withholding autopsy photographs of President John F. Kennedy. *Katz v. National Archives & Records Administration*, 862 F. Supp. 476, 485 (D.D.C. 1994), *aff'd on other grounds*, 68 F.3d 1438 (D.C. Cir. 1995). But autopsy photographs are part of the medical record and therefore subject to heightened standards of privacy. 68 F.3d at 1441 ("The x-rays and photographs are medical records, which are usually considered private.") (citing 5 U.S.C. § 552(b)(6), which exempts "medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"). Moreover, the photographs of Mr. Foster are plainly agency records, in contrast to the finding that the Kennedy pictures are part of his presidential papers. 68 F.3d at 1442.

Here, the photographs taken of Mr. Foster at Fort Marcy Park were not medical at all; nor do they reveal any intimate

information. Mr. Foster was fully clothed and the photographs merely capture what was available to any passerby. Disclosure of the photographs at issue here does not require release of autopsy or other medical records about other victims. *See e.g., Bowen v. FDA*, 925 F.2d 1225, 1228 (9th Cir. 1991) (the privacy interest in the autopsy report of a private victim falls under Exemption 6 from FOIA disclosure). Concerns about publication of medical records, like that expressed by Teresa Earnhardt as *amicus* here, are misplaced in the context of the non-medical records at issue here. Petitioner's numerous cites to examples of medical records are irrelevant to this dispute and offer no support for concealing these very public photographs. Pet. Br. at 24-26.

Congress has not created an exemption for relatives of the subject of government information, nor should this Court. Where, as here, the issue at stake is government credibility for its own investigative reports, such an exemption is particularly unjustified. "[T]he citizenry is the final judge of the proper conduct of public business." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975). Exemption 7(C) does not entitle the government to escape scrutiny based on an alleged privacy interest of a deceased victim and his surviving relatives.

In contrast to other cases concerning the privacy of relatives of the deceased, the post-mortem official photographs of Mr. Foster were taken on public property by public officials. Even if a privacy right survived death – which it does not under common law – Mr. Foster himself lacked any reasonable expectation of privacy in these photographs. The interests of his relatives can be no greater than his own.

Moreover, if a legitimate privacy interest in facts of a deceased did exist, only the children as next-of-kin should have standing to assert it. Yet Mr. Foster's children have not sued to prevent release of these photographs, and their absence cannot be filled by other relatives. It may be that some relatives, perhaps even some children, favor additional scrutiny of

the government conduct here. A privacy interest under FOIA cannot extend without limit beyond the children to other relatives. The government's position implicitly rejects any meaningful limits on time and relation in asserting a privacy exemption for relatives.

The concealment of these photographs speaks volumes about the operations of government in investigating Mr. Foster's death and ferreting out, or covering up, the truth. This contrasts sharply with decisions upholding application of the Exemption 7(C) to information arising from a public tragedy. *See, e.g., New York Times Co. v. NASA*, 782 F. Supp. 628, 633 (D.D.C. 1991) (applying Exemption 6 to withhold conversations on the Challenger just prior to its explosion because "[w]hat the astronauts knew or did not know about the explosion says nothing about the operations of NASA.").

Vincent Foster served our country at a high level and died in office. The government blamed him, and him alone, for his death. FOIA enables citizens to scrutinize this self-serving conclusion by our government by accessing the photographs of Mr. Foster taken in a public park. If the photographs support the government's reports, then it has no motivation to withhold them. If, however, the photographs are inconsistent with the official account, then FOIA requires their release for that very reason. FOIA disclosures ultimately protect Vincent Foster and those like him to ensure accountability for explanations provided by our government.

The government admitted that the photographs at issue here are "some of the best evidence" of the fatal wounds, and therefore release of that evidence is essential to scrutinize the government's conclusions. *Accuracy in Media*, 194 F.3d at 124. Respondent is entitled to full compliance with his FOIA request in order to obtain this "best evidence." The government has no basis for concluding that "[t]he public's interest in matters pertaining to [Mr. Foster's] death and its investigation has been satisfied." Pet. Br. 50 (emphasis omitted). The

public's interest will not be satisfied until it gains access to the best evidence, as required by FOIA.

III. Redaction of Personal Characteristics, Not Wholesale Concealment, is All that Exemption 7(C) Could Permit Here in the Name of Privacy.

FOIA requires redaction of portions of records under Exemption 7(C) and release of the remainder. "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). *See also United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 765 (1989). Only the personal characteristics of the photographs, such as Mr. Foster's eyes, nose and mouth, are even plausibly exempt from disclosure. The alleged neck wound, the isolated flow of blood, the glasses, and numerous other features of the photographs implicate no legitimate privacy interests.

The plain language of Section 552(b) requires redaction only of the exempt portions of the photographs at issue. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989) ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."). A triangular black-out of the eyes, nose and mouth would satisfy this mandate, while a withholding of the complete photographs would not. Likewise, a computer-based alteration of the appearance of the subject himself would be possible while still producing essential information.

The official government position is that there was no bullet wound in the neck of Mr. Foster, who supposedly died by shooting himself in his mouth. If true, then there is no legitimate objection to releasing the portion of the photographs containing images of Mr. Foster's neck. Under the government's view, these images would be uninteresting and therefore unlikely to generate any media attention, and their publication would at most confirm what the government has said all along. There is no basis under Exemption 7(C) for withholding these images. It is only in the event that the photographs are inconsistent with the official government position that there would be media exposure – publicity that FOIA supports.

The Fifth Circuit has compelled the government to produce documents under FOIA based on this requirement of redaction. *See Cooper Cameron Corp. v. United States DOL*, 280 F.3d 539 (5th Cir. 2002). There the Department of Labor insisted on withholding 145 pages of its investigation of a petrochemical facility, citing Exemption 7 as the basis. *Id.* at 542. There, as here, the federal government defended its refusal to segregate Exemption 7(C) portions and disclose the remainder. The Court of Appeals ordered disclosure of withheld information with only names and addresses redacted. *Id.* at 554. Exemption 7(C) does not justify wholesale concealment of entire records, at least not when the subject was a high-ranking public official.

CONCLUSION

Ten photographs were taken of Vincent Foster's fully clothed body in Fort Marcy Park. To this day, the government has refused to release them for independent scrutiny. *Amici* urge full release of the photos, so that the public can draw its own conclusions from the facts.

The precedent at stake is whether the government can hide behind Exemption 7(C) to FOIA. Ten years have passed and Mr. Foster's children have not sued to block release. Respondent has agreed to redact any portion of the photos that may be offensive. Government accountability is necessary here and in future cases dependent on this precedent.

For the foregoing reasons, the post-mortem photographs of Vincent Foster should be released.

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